

1 WEISS & JONES, L.L.P.
Philip E. Weiss, Esq. (No. 152523)
2 1551 Shelter Island Drive
San Diego, California 92106
3 Telephone: (619) 225-8884
Facsimile: (619) 225-8801
4 E-Mail: shiplaw@earthlink.net

5 Attorneys for Plaintiff
Bartell Hotels, a California Limited Partnership,
6 dba Half Moon Anchorage

7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10
11 BARTELL HOTELS, A California Limited
Partnership, dba HALF MOON ANCHORAGE,

12 Plaintiff,

13 v.

14 M/Y CLAIRE IRENE, a 1968 Owens Motor
15 Yacht of Approximately 40-Foot In Length And
11-Foot In Beam, Bearing California D.M.V.
16 Registration No. CF 8646 ED, AND ALL OF
HER ENGINES, TACKLE, ACCESSORIES,
17 EQUIPMENT, FURNISHINGS AND
APPURTENANCES, *in rem*,

18 Defendant.

Case No. 07 CV 2097 L (BLM)

IN ADMIRALTY

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S APPLICATION
FOR DEFAULT JUDGMENT BY
COURT

F.R.C.P. Admiralty Rules C and E;
Local Adm. Rule E.1.e.2; F.R.C.P. 56

SUBMITTED ON PAPERS
(Oral Arguments Not Requested)

Judge: Hon. M. James Lorenz
Courtroom: 14 - 5th Floor
Date: June 16, 2008
Time: 10:30 a.m.

TABLE OF CONTENTS

		<i>Page No.</i>
1	I. INTRODUCTION AND STATEMENT OF FACTS	1
2		
3	II. LEGAL ARGUMENTS	6
4		
5	A. Judgment By Court is Necessary, Because Taxable Costs Cannot	
6	Be Determined In Advance of the Interlocutory Sale of the	
7	Defendant Vessel Standards for Entry of Default Judgment By Court	6
8	B. The Standards for Default Judgment Are Met In This Case	7
9	C. The Court Is Property Vested With	
10	Admiralty Contract and Tort Jurisdiction	9
11	1. Admiralty Jurisdiction Over Maritime Contracts	9
12	2. Admiralty Jurisdiction Over Maritime Torts	10
13	D. PLAINTIFF Was Contractually Entitled to Receive Payment for	
14	Wharfage Services It Provided, To Receive Proof of Insurance, To	
15	Terminate the Wharfage Contract Upon 30 Days' Notice And	
16	To Require The DEFENDANT VESSEL To Vacate The Marina	12
17	E. The DEFENDANT VESSEL Occupied Slip Space Without Contractual	
18	Or Other Authority, And Hence Engaged In the Maritime Tort of Trespass	13
19	F. Entitlement to and Quantification of Damages	15
20	1. Damages Based on Consequences Flowing From Tort of Trespass	15
21	2. Costs of Suit Recoverable Pursuant to Local Rule	16
22	3. Recoverable Transient Wharfage Fees	16
23	4. Recoverable Transient Wharfage Fees	16
24	5. Monthly Wharfage Fee Arrearages	18
25	6. Prejudgment Interest Is Recoverable at 5.0%	18
26	F. Total Damages Recoverable	18
27	1. Wharfage Arrearages	18
28	2. Guest Vessel Wharfage Fees	19

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page No.

3. <i>Custodia Legis</i> Expenses – U.S. Marshal Fees and Substitute Custodian Fees	19
4. Filing Fee	20
5. Attorneys’ Fees (Not Requested)	20
III. CONCLUSION	20

TABLE OF AUTHORITIES**Federal Statutes and Rules*****Page No.***

United States Constitution Article III, section 2, Clause 1.....	9
Supplemental Admiralty Rule C(6)(a)(i)	2
F.R.C.P. 55(b)(1).....	6
F.R.C.P. 55(b)(2).....	6
28 U.S.C. Section 1921(a)(1)(E)	7
46 U.S.C. Section 31301	10
46 U.S.C. Section 31301(5)(B)	14

California State Statutes and Rules

California Civil Code Section 1943	4
California Civil Code Section 3333	15

Federal Cases

Action S.A. v. Marc Rich & Co. 951 F.2d 504, 508 (2nd Cir. 1991).....	7
Barwil ASCA v. M/V SAVA 44 F. Supp. 2d 484, 489 (E.D.N.Y 1999).....	16
Cargill, Inc. v. Taylor Towing Service, Inc 642 F.2d 239 (8th Cir. 1981).....	18
Combs v. Coal & Mineral Management Serv. 105 F.R.D. 472 (D DC 1984).....	6
Compania Anonima Venezolana De Navegacion v. A. J. Perez Export Co. 303 F.2d 692, 699 (5th Cir. 1962)	17
Contra, Mammoot Shipping Co. v. MARK TWAIN 610 F. Supp. 862 (S.D.N.Y. 1985).....	10
Davis v. Fendler 650 F.2d 1154 (9th Cir. 1981).....	7
Diamond State Tel. Co. v. Atlantic Refining Co. 205 F.2d 402, 406 (3rd Cir. 1953)	14
Dundee Cement Co. v. Howard Pipe & Concrete Products 722 F.2d 1319, 1323 (7th Cir. 1983).....	7

	<i>Page No.</i>
Edinburgh Assurance Co. v. R.L. Burns Corp. 669 F.2d 1259 (9th Cir. 1982).....	18
Eitel v. McCool 782 F.2d 1470, 1471-1472 (9th Cir. 1986).....	8
Executive Jet Aviation, Inc. v. Cleveland 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972).....	11
Ex Parte EASTON 95 U.S. 681 (1877).....	2, 9
Ferrous Financial Servs. Co. v. O/S ARCTIC PRODUCER 567 F. Supp. 400 (W.D. Wash. 1983)	15
Fireman's Fund Ins. Co. v. M/V DSR ATLANTIC, Etc., 131 F.2d 1336, 1338 (9th Cir. 1997)	13
Foremost Ins. Co. v. Richardson 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982) reh. denied 459 U.S. 899, 103 S.Ct. 198, 74 L.Ed.2d 160 (1982).....	11
Forteza v. Miller 534 F.2d 415 (1st Cir. 1976).....	6
Gator Marine Service Towing, Inc. v. J. Ray McDermott & Co. 651 F.2d 1096 (5th Cir. 1981).....	18
Hough v. Western Transp. Co. (The PLYMOUTH) 70 U.S. (3 Wall.) 20, 18 L.Ed. 125 (1865).....	10
Independent Bulk Transp. v. Vessel "Morania Abaco" 676 F.2d 23, 25 (2d Cir. 1982).....	18
Ingersoll Milling Mach. Co. v. M/V Bodena 829 F.2d 293, 310 (2d Cir. 1987).....	18
In re AMOCO CADIZ 1992 A.M.C. 913 (7th Cir. 1992).....	18
In re Banks' Petition 133 F. Supp. 276 (E.D.N.Y. 1955)	14
In re Nichole Trahan 10 F.3d 1190, (5th Cir. 1994).....	18
Mitsui & Co. v. American Export Lines 636 F.2d 807, 823 (2d Cir. 1981)), cert. denied, 484 U.S. 1042, 108 S. Ct. 774, 98 L. Ed. 2d 860 (1988).....	18
Morgan Guar. Trust Co. v. Hellenic Lines Ltd., et al. 593 F. Supp. 1004 (S.D.N.Y. 1984).....	16

	<i>Page No.</i>
New York Dock Co. v. The POZNAN 274 U.S. 117, 71 L. Ed. 955, 47 S. Ct. 482 (1927).....	16
New York Trap Rock Corp., Etc. v. Red Star Towing & Transp. Co., 172 F. Supp. 638, 644 (S.D.N.Y. 1959)	14
Reeled Tubing, Inc. v. M/V CHAD G 794 F.2d 1026 (5 th Cir. 1986).....	18
Royal Ins. Co. v. America v. Pier 39 Ltd., Partnership 738 F.2d 1035, 1037 (9 th Cir. 1984).....	10
Selame Assoc. Inc. v. Holiday Inns, Inc. 451 F. Supp. 412 (D. Mass. 1978).....	9
Sisson v. Ruby 497 U.S. 358, 110 S.Ct. 2892, 111 L.Ed.2d 292 (1990).....	10
TeleVideo Systems, Inc. v. Heidenthal 826 F.2d 915, 917 (9 th Cir. 1987).....	7
The CHANCELLOR 30 F.2d 227, 228-229 (2 nd Cir. 1929)	14
The CHINA 74 U.S. (Wall.) 53, 68, 19 L.Ed. 67 (1868)	13
The WESTERN WAVE 77 F.2d 695 (5 th Cir. 1935).....	1, 9
Turner & Blanchard, Inc. v. S.S. EMILIA 322 F.2d 249 (2 ^d Cir. 1963).....	16
United States v. Central Gulf Lines, Inc. 974 F.2d 621 (5 th Cir. 1992).....	18
<u>State Cases</u>	
Brown v. Superior Court 34 Cal.2d 559, 212 P.2d 878 (1949)	17
Church of Christ in Hollywood v. Superior Court 99 Cal. App. 4th 1244, 1252 (2002).....	14
Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty 129 Cal. App. 4th 1228, 1264; 29 Cal. Rptr. 3d 521 (2005)	14
Miller v. National Broadcasting Co. 187 Cal. App. 3d 1463, 1477, 232 Cal.Rptr. 668.....	14, 15

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page No.

Treatises and Other Authority

T. Schoenbaum, Admiralty and Maritime Law (West Publishing 2004) at section 9-1	14
--	----

WEISS & JONES, L.L.P.
Philip E. Weiss, Esq. (No. 152523)
1551 Shelter Island Drive
San Diego, California 92106
Telephone: (619) 225-8884
Facsimile: (619) 225-8801
E-Mail: shiplaw@earthlink.net

Attorneys for Plaintiff
Bartell Hotels, a California Limited Partnership,
dba Half Moon Anchorage

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BARTELL HOTELS, A California Limited
Partnership, dba HALF MOON ANCHORAGE,

Plaintiff,

v.

M/Y CLAIRE IRENE, a 1968 Owens Motor
Yacht of Approximately 40-Foot In Length And
11-Foot In Beam, Bearing California D.M.V.
Registration No. CF 8646 ED, AND ALL OF
HER ENGINES, TACKLE, ACCESSORIES,
EQUIPMENT, FURNISHINGS AND
APPURTENANCES, *in rem*,

Defendant.

Case No. 07 CV 2097 L (BLM)

IN ADMIRALTY

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S APPLICATION FOR
DEFAULT JUDGMENT BY
COURT

F.R.C.P. Admiralty Rules C and E;
Local Adm. Rule E.1.e.2; F.R.C.P. 56

SUBMITTED ON PAPERS
(Oral Arguments Not Requested)

Judge: Hon. M. James Lorenz
Courtroom: 14 - 5th Floor
Date: June 16, 2008
Time: 10:30 a.m.

COMES NOW Plaintiff BARTELL HOTELS, dba HALF MOON ANCHORAGE
("PLAINTIFF") and respectfully submits its Memorandum of Poits and Authorities in
Support of its Application for Default Judgment By Court.

I.

INTRODUCTION AND STATEMENT OF FACTS

This is an action *in rem* to satisfy a maritime lien that exists in favor of PLAINTIFF as
a result of its having provided maritime "necessaries" (wharfage services) for the benefit of

1 the DEFENDANT VESSEL, for which services it was not paid. *See, e.g., Ex Parte*
2 *EASTON*, 95 U.S. 681 (1877) (recognizing contracts for wharfage services, whether express
3 or implied, give rise to maritime liens); *see also The WESTERN WAVE*, 77 F.2d 695 (5th
4 Cir. 1935). Another maritime lien exists in PLAINTIFF's favor, based on the DEFENDANT
5 VESSEL's tort of trespass. PLAINTIFF here seeks entry of Default Judgment By Court.
6 Entry of Default Judgement by the Clerk is inappropriate, as *custodia legis* expenses are still
7 accruing, and accordingly PLAINTIFF's damages cannot be yet fully quantified.

8 Neither the owner of the DEFENDANT VESSEL nor any other person or entity
9 answered or otherwise responded to PLAINTIFF's Verified Complaint within the period
10 permitted by the Federal Rules of Civil Procedure, and accordingly the Clerk of this
11 Honorable Court has entered a Default against the DEFENDANT VESSEL. Similarly, no
12 person or entity has filed a Verified Statement of Right or Interest in the DEFENDANT
13 VESSEL, as required by Supplemental Admiralty Rule C(6)(a)(i). PLAINTIFF is,
14 accordingly, the lone litigant in this action.

15 PLAINTIFF operates a marina known as "Half Moon Anchorage," which is located at
16 2303 Shelter Island Drive, San Diego, California 92106. The DEFENDANT VESSEL is a
17 30 year old Owens motor yacht of approximately 40 feet in length and 11 feet in beam,
18 named and known as "M/Y CLAIRE IRENE," California D.M.V. (expired) Registration No.
19 CF 8646 ED. First Amended Verified Complaint for Vessel arrest at para. 3.

20 PLAINTIFF purchased the former owner's interest in Half Moon Anchorage
21 (hereinafter the "Marina") in January, 2007. Declaration of Brad Oliver in Support of
22 Motion for Order for Interlocutory Vessel Sale ("Oliver Decl.") at para. 2. At that time, the
23 DEFENDANT VESSEL had already been there for years, apparently since at least 2001.
24 Oliver Decl. at para. 2. Based on its review of an accounting history relating to the
25 DEFENDANT VESSEL, PLAINTIFF believes and has alleged that since March, 2001, the
26 account for the DEFENDANT VESSEL has been arrears on at least 15 occasions, and that on
27 at least two occasions her owner tendered checks that were returned for want of sufficient
28 funds. Oliver Decl. at para. 3.

1 Mr. Michael J. Ardelt, the General Manager of the Marina prior to the time Plaintiff
2 purchased the former owner's interest in the marina, has informed PLAINTIFF that he has
3 personally seen an Agreement for Wharfage and Docking (the standardized contract used by
4 the Marina's former owner, hereinafter referred to as the "Wharfage Contract") that was
5 signed by the owner of the DEFENDANT VESSEL, Mr. Kurt Hatch; however, he has been
6 unable in spite of his good faith efforts to locate said Agreement or a copy. *See also*,
7 Declaration of Michael J. Ardelt Concerning Existence of Month-to-Month Contract for
8 Defendant Vessel (at para. 8), on file herein and previously offered in support of
9 PLAINTIFF's (Second) Application for Issuance of Warrant for Vessel Arrest. An exemplar
10 of the Wharfage Contract is attached both as Exhibit A to the First Amended Verified
11 Complaint, and as Exhibit A to the Declaration of Philip E. Weiss in Support of Motion for
12 Default Judgment By Court, filed contemporaneously herewith; Weiss Decl. at para. 2.

13 It should be noted at the outset that the "Wharfage Contract" is, by its own terms, a
14 month-to-month contract, terminable by either party, as paragraph 2 specifically provides that
15 "Owner understands and agrees that this agreement memorializes a month-to-month contract
16 to provide mooring . . . [and paragraph 5 provides that] Owner understands and agrees that
17 this agreement may be terminated by either party upon written notice to the other in such a
18 manner so that the other party will receive said notice at least thirty (30) days before said
19 termination." Exh. A to First Amended Verified Complaint for Vessel Arrest. Naturally, it
20 also requires that the DEFENDANT VESSEL and her owner to timely tender monthly
21 payments for wharfage and other maritime services. PLAINTIFF alleges in this action that
22 the DEFENDANT VESSEL failed to perform this duty of payment.

23 Even if Mr. Hach did not sign the Wharfage Contract, an implied freely terminable
24 month-to-month wharfage contract would nevertheless have existed between PLAINTIFF on
25 the one hand and the DEFENDANT VESSEL and her owner on the other hand, as a well
26 defined controlling industry standard exists within the Port of San Diego among privately
27 operated marinas, pursuant to which marinas enter into freely terminable month-to-month
28 wharfage contracts, rather than long term wharfage contracts. Weiss Decl. at para. 3. What

1 is more, even if no controlling industry standard existed (and PLAINTIFF is unaware of any
2 evidence to suggest this), a freely terminable implied wharfage contract on month-to-month
3 terms nevertheless exists between PLAINTIFF on the one hand and the DEFENDANT
4 VESSEL and her owner on the other hand, since California Civil Code Section 1943
5 provides that “[a] hiring of real property, other than lodgings and dwelling-houses, in places
6 where there is no custom or usage on the subject, is presumed to be a month-to-month
7 tenancy unless otherwise designated in writing”

8 After it purchased the Marina, in order to control risk and liability and for other
9 business reasons, PLAINTIFF carefully reviewed the existing circumstances and procedures
10 at the Marina and decided to make certain improvements and changes. Oliver Decl. at para.
11 4. This included examining the vessels at the Marina in order to generally evaluate their
12 condition, verifying that all vessels located at the Marina were insured, and preparing a new
13 wharfage contract for review and execution by vessel owners. Oliver Decl. at para. 4. It
14 appeared, upon PLAINTIFF’s examination, that the DEFENDANT VESSEL was (as she still
15 is) in demonstrably poor, unseaworthy condition, exhibiting evidence of dry rot, years of
16 growth on her bottom, blistering and peeling paint, with debris scattered aboard. Oliver
17 Decl. at para. 4. In fact, during the pendency of this action it became necessary for
18 PLAINTIFF to request an Order from this Honorable Court permitting it, in its capacity as
19 Substitute Custodian, to arrange for the dewatering of the DEFENDANT VESSEL and
20 disposal of contaminated water. The requested Order issued.

21 PLAINTIFF requested that all vessel owners for whom PLAINTIFF did not have
22 current evidence of vessel insurance, provide such evidence. Oliver Decl. at para. 5.
23 PLAINTIFF also requested that vessel owners review and execute a new wharfage contract.
24 Oliver Decl. at para. 5. Although a few boat owners failed to provide the requested proof of
25 insurance or declined to execute the new wharfage contract and hence moved their vessels to
26 other locations, the vast majority of boat owners complied with these requests, did not
27 exercise their right to terminate their wharfage contracts, and they remain today at the Marina
28 as tenants in good standing. Oliver Decl. at para. 5. After it purchased the leasehold

1 PLAINTIFF also dispatched a form letter to all vessel owners, including Mr. Hach, notifying
 2 them they were free to pick up a new Marina gate access card at the Marina Office. Oliver
 3 Decl. at para. 5. Mr. Hach never retrieved a new gate access card at the Marina Office.
 4 Oliver Decl. at para. 5. Mr. Hach also *never provided the requested proof of insurance*.
 5 Oliver Decl. at para. 5.

6 As a consequence of the poor condition of the DEFENDANT VESSEL, her
 7 continuing lack of any maintenance whatever, and her owner's refusal to both provide proof
 8 of insurance and to execute a new wharfage contract, PLAINTIFF became compelled to
 9 terminate the wharfage contract for the DEFENDANT VESSEL. Accordingly, on August 17,
 10 2007 PLAINTIFF's counsel dispatched a letter via Certified U.S. Mail to Mr. Hach, in which
 11 he was advised of the termination of his vessel's wharfage contract, effective 34 days from
 12 the date of the letter – on September 20, 2007. A true and correct copy is attached as Exhibit
 13 B to the Declaration of Philip E. Weiss in Support of Application for Default Judgment By
 14 Court, filed contemporaneously herewith; Weiss Decl. at para. 4. This letter also explained
 15 the legal fiction indulged in admiralty that a vessel is a (juridical) person, and that
 16 accordingly if the DEFENDANT VESSEL was not removed by the specified date she would
 17 become a trespasser, and could be held accountable by way of a vessel arrest and subsequent
 18 interlocutory vessel sale. It also reminded Mr. Hach that any allegations he advanced
 19 concerning claimed damage to his vessel and financial and other misconduct by a marina
 20 manager employed by a former owner^{1/} are not properly addressed by PLAINTIFF, the
 21 current owner of the Marina.

22 On the date specified for termination of the wharfage contract (August 20, 2007)
 23 PLAINTIFF's counsel contacted Mr. Hach, the owner of the DEFENDANT VESSEL, to
 24 inquire as to why the DEFENDANT VESSEL had not been removed from the Marina, and in
 25

26 ^{1/} It is believed that a Marina Manager employed by the entity that owned the marina prior to
 27 PLAINTIFF purchasing it (Ms. Ann Miller) was terminated and prosecuted in connection with her
 28 scheme to divert to herself wharfage fees and other monies that were due to her employer.
 PLAINTIFF has no way of knowing whether the owner of the DEFENDANT VESSEL, Mr. Hach
 was a victim of Ms. Miller's misconduct, which occurred prior to the time PLAINTIFF owned the
 marina. Weiss Decl. at para. 5.

1 order to ascertain his intentions vis-a-vis removing her from the Marina. Weiss Decl. at para.
 2 6. Mr. Hach did not agree to remove the DEFENDANT VESSEL. To the contrary, he
 3 insisted that if PLAINTIFF did not pay him \$50,000 to \$70,000, (apparently for “damages”
 4 he believes his vessel sustained as a result of claimed misconduct by a Marina Manager, who
 5 was employed by the former owner of the marina), he would “sue PLAINTIFF for \$1.2
 6 million.” Weiss Decl. at para. 6. He also indicated that he believed that he would be unable
 7 to obtain another slip for his vessel, even if approved, “because Homeland Security will not
 8 permit him to move.” Weiss Decl. at para. 7. PLAINTIFF is unaware of any restriction
 9 imposed by “Homeland Security” that would prevent or inhibit a boat owner from moving his
 10 or her vessel to a new berthing location. Weiss Decl. at para. 7.

11 There being no alternative, PLAINTIFF became compelled to seek the assistance of
 12 this Honorable Court to vindicate its property and admiralty rights.

13 II

14 LEGAL ARGUMENTS

15 PLAINTIFF brought this admiralty action *in rem* pursuant to (among other authority)
 16 Supplemental Admiralty Rules C and E of the Federal Rules of Civil Procedure, after the
 17 owner of the DEFENDANT VESSEL: failed to pay wharfage fees due for accommodations
 18 provided for the benefit of the DEFENDANT VESSEL; failed to provide evidence of
 19 insurance on the 40 year old vessel; and failed to remove her from the marina following
 20 termination of the Wharfage Contract.

21 A. Judgment By Court is Necessary, Because Taxable Costs Cannot Be 22 Determined In Advance of the Interlocutory Sale of the Defendant Vessel.

23 In all cases where the requirements for a clerk-entered default judgment cannot be
 24 met, the Plaintiff must apply to the Court to obtain a default judgment. F.R.C.P. 55(b)(2);
 25 Forteza v. Mills, 534 F.2d 415 (1st Cir. 1976). Given that a Court Clerk is vested with no
 26 discretion in entering a default judgment, the amount due must either be fixed or
 27 determinable by simple computation. F.R.C.P. 55(b)(1); Combs Coal & Mineral Mgmt.
 28 Serv., 105 F.R.D. 472 (D.DC 1984). At this juncture, damages cannot be fixed or

determined, because PLAINTIFF is entitled to recover as part of its damages its “costs” of suit, including *custodia legis* expenses, and these damages cannot be ascertained before the duties of the U.S. Marshal and the Substitute Custodian are terminated (following anticipated interlocutory auction of the vessel and confirmation of the sale). Section 1921(a)(1)(E) of Title 28 of the United States Code provides that a court may tax as costs “the keeping of attached property (including boats, vessels or other property attached or libeled), actual expenses incurred, such as storage, moving, boat hire or other special transportation, watchmen’s or keepers’ fees”

The *custodia legis* expenses (U.S. Marshal fees and Substitute Custodian fees) are still accruing, and will continue to accrue until the DEFENDANT VESSEL is either released from custody or she is sold at interlocutory auction by the U.S. Marshal. There exists no indication anyone has any interest in the DEFENDANT VESSEL (no one has appeared in this action to stake an ownership or other interest in her), so it seems extremely unlikely anyone will seek the release of the DEFENDANT VESSEL, which is in very poor condition. Therefore, until the vessel is sold at public auction pursuant to Order of this Honorable Court, *custodia legis* expenses will continue to accrue, and PLAINTIFF’s damages will not until such time be made final and certain, such that the Clerk of the Court would be empowered to enter Judgment.

B. The Standards For Default Judgment Are Met In this Case.

In connection with a plaintiff’s application for entry of judgment by the Court, the Court is vested with authority to base its judgment entirely on the affidavits submitted. *See, e.g., Davis v. Fendler*, 650 F.2d 1154 (9th Cir. 1981); and *Action S.A. v. Marc Rich & Co.*, 951 F.2d 504, 508 (2nd Cir. 1991). Ordinarily, entry of default establishes the liability of the defendant(s), as “upon default, the well-pleaded allegations of the complaint relating to liability are taken as true” (though not allegations as to the *quantum* of damages). *See, Dundee Cement Co. v. Howard Pipe & Concrete Products*, 722 F.2d 1319, 1323 (7th Cir. 1983); and *TeleVideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Damages, too, may properly be established by way of declarations or affidavits.

1 In determining whether to grant a default judgment, Courts often consider several
2 factors, including: (1) the substantive merits of the plaintiff's claims; (2) the sufficiency of
3 the Complaint; (3) the amount of money at stake; (4) the possibility of prejudice to the
4 plaintiff if relief is denied; (5) the possibility of dispute as to any material facts in the case;
5 (6) whether the default resulted from excusable neglect; and (7) the public policy favoring
6 decisions on the merits. Eitel v. McCool, 782 F.2d 1470, 1471-1472 (9th Cir. 1986). Plaintiff
7 respectfully suggests that each of these factors favors entry of Default Judgment.

8 As explained above, the owner of the DEFENDANT VESSEL allowed her to
9 deteriorate into a clearly unseaworthy condition, to the point where she required dewatering
10 during the pendency of this action pursuant to Court Order. He failed to provided requested
11 evidence of insurance, or to pay wharfage fee arrearages. Instead, he effectively abandoned
12 his derelict vessel at PLAINTIFF's marina, rather than incurring the expense of hauling the
13 DEFENDANT VESSEL from the water for either substantial work or (more practically)
14 disposal.

15 The merits of PLAINTIFF's claim are clear, precise and well supported. The First
16 Amended Verified Complaint states viable Counts in admiralty against the DEFENDANT
17 VESSEL based on her trespass arising from her failure to vacate the marina after termination
18 of the Wharfage Contract (Verified Complaint at 4:4-7:12), and her failure to satisfy
19 PLAINTIFF's maritime "necessaries" lien arising from PLAINTIFF's provision of wharfage
20 services (Verified Complaint at 7:22-8:14). To vindicate its rights has costs PLAINTIFF
21 several thousands of dollars in attorneys' fees and costs of suit. It respectfully suggests that
22 no reason in logic or law exists not to enter judgment at this.

23 The material facts are plain and supported by ample evidence that is beyond
24 reasonable question. The vessel owner was properly served with process and both the
25 original and the First Amended Verified Complaint in this action; for unknown reasons he
26 elected not to appear to file a claim of ownership interest in the DEFENDANT VESSEL or
27 to file an Answer to Complaint or other responsive pleading. The merits of PLAINTIFF's
28 claims are manifest. The DEFENDANT VESSEL failed to pay wharfage fees, giving rise to

a maritime “necessaries” lien against her. Likewise, it is indisputable that she failed to vacate following termination of her Wharfage Contract, and that, until she was arrested pursuant to Order of this Court, she occupied a slip in the capacity of a trespasser, which gives rise to an independent tort lien against the offending vessel. Though enormously important property rights are implicated, when contrasted with many cases that are before this Court, the monetary claim against the DEFENDANT VESSEL is comparatively modest (less than \$10,000 in wharfage arrearages, plus the “costs” of arrest). This is a “no win” case for PLAINTIFF, what ever the outcome. This is because the DEFENDANT VESSEL is in such poor condition that she is unlikely to sell at public auction (assuming the Court Orders one), so there will be no funds (substitute res) with which to satisfy PLAINTIFF’s claims, and, worse yet, PLAINTIFF will likely become compelled to purchase the DEFENDANT VESSEL on a credit bid (assuming the Court permits it) and arrange for her disposal (at a further cost of thousands of dollars). Any delay in resolution of this case enures to PLAINTIFF’s clear detriment. PLAINTIFF respectfully suggests that all of the factors Courts generally consider in connection with an Application for Entry of Judgment by Court weigh in favor of granting judgment at this time, and that none weigh against such a decision.

C. The Court Is Properly Vested With Admiralty Contract and Tort Jurisdiction.

1. Admiralty Jurisdiction Over Maritime Contracts.

Article III, section 2, Clause 1 of the United States Constitution grants to Federal Courts to be created by Congress judicial power over cases of "admiralty and maritime" jurisdiction. In general terms, admiralty has jurisdiction over all disputes arising under contracts concerning navigation of vessels or water commerce, or whereby goods or services are to be provided to ships engaged in water commerce. Contracts to provide wharfage services (*i.e., berthing accommodations*) for a vessel is without, question, a maritime contract. *See, e.g., Ex Parte EASTON*, 95 U.S. 681 (1877) (recognizing that contracts for wharfage, *whether express or implied*, give rise to maritime liens); *The WESTERN WAVE*, 77 F.2d 695 (5th Cir. 1935) (so recognizing); *Selame Assoc. Inc. v. Holiday Inns, Inc.*, 451 F. Supp. 412 (D. Mass. 1978)

(contracts for wharfage are maritime contracts); Contra, Mammoet Shipping Co. v. MARK TWAIN, 610 F. Supp. 862 (S.D.N.Y. 1985) (contracts for wharfage are maritime contracts); and 46 U.S.C. section 31307, (the Commercial Instruments and Federal Maritime Lien Act) notes 46 and 47. There can be no legitimate doubt that a contract for the provision of wharfage services, such as is at issue here, is property the subject of admiralty jurisdiction. *See, e.g., Royal Ins. Co. v. America v. Pier 39 Ltd., Partnership*, 738 F.2d 1035, 1037 (9th Cir. 1984) ("wharfage contracts are maritime if wharfage is provided to a specific vessel").

PLAINTIFF's First Amended Verified Complaint states a Count for Breach of Contract For Necessaries, based on the DEFENDANT VESSEL's failure to wharfage fee arrearages in the amount of \$1,929.60 that had accrued by the date the Wharfage Contract terminated (on September 21, 2007), and also the DEFENDANT VESSEL's failure to pay transient wharfage fees accruing after the date the Wharfage Contract terminated. Oliver Decl. at para. 6. It is PLAINTIFF's usual and customary practice to charge "transient vessels" (*i.e.*, those without an existing Wharfage Contract staying for a short period and interloping vessels) wharfage fees calculated at the rate of \$1.50 per foot of vessel length per day, or \$60.00 per day for the DEFENDANT VESSEL (*i.e.*, 40 feet X \$1.50 = \$60). Oliver Decl. at para. 7. It is believed that it is a uniform practice in San Diego's marina industry to charge a transient rate calculated in the above manner, though it is known that at least some other marinas charge a rate higher than \$1.50 per foot per day. Oliver Decl. at para. 7; Weiss Decl. at para. 8.

The DEFENDANT VESSEL had a legal obligation to pay wharfage fees, but failed to do so, thus giving rise to the filing of the instant action. The contract for wharfage at issue is, without a scintilla of reasonable doubt, a maritime contract, the alleged breach of which properly gives rise to this Honorable Court's admiralty contract jurisdiction, and PLAINTIFF's entitlement to recover damages.

2. Admiralty Jurisdiction Over Maritime Torts.

Supreme Court long ago confirmed that: "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." Hough v. Western Transp. Co. (The PLYMOUTH), 70 U.S. (3 Wall.) 20, 18 L.Ed.

1 125 (1865) (*emphasis added*). Over the years this pure locality test for admiralty tort jurisdiction
2 has been modified by subsequent Supreme Court decisions. In Executive Jet Aviation, Inc. v.
3 Cleveland, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972) the Supreme Court added another
4 prerequisite for admiralty tort jurisdiction – that "the wrong bear a significant relationship to a
5 traditional maritime activity." *Id.* It is evident that the provision of wharfage accommodations
6 for vessels constitutes a "traditional maritime activity," and that the wrong (the tort of trespass
7 by the DEFENDANT VESSEL) is significantly, in fact inextricably, related to such traditional
8 maritime activity – the provision of wharfage services.

9 The Supreme Court further developed the "traditional maritime activity" factor in
10 Foremost Ins. Co. v. Richardson, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982)
11 *rehearing denied* 459 U.S. 899, 103 S.Ct. 198, 74 L.Ed.2d 160 (1982), a case involving a
12 collision of two pleasure yachts. In the Foremost case the Court rejected the argument that
13 "traditional maritime activity" means *commercial* activity. Finally, in 1990 the United States
14 Supreme Court again considered the issue of admiralty tort jurisdiction in Sisson v. Ruby, 497
15 U.S. 358, 110 S.Ct. 2892, 111 L.Ed.2d 292 (1990). The Supreme Court in this case clarified that
16 it is not necessary that the type of wrong involved (here the trespass of a vessel at a wharf)
17 directly impact maritime commerce – a *potential* impact is sufficient.

18 It is obvious that the type of tort here involved, trespass by a vessel, could potentially have
19 a significant adverse impact on maritime commerce. For example, if vessels were permitted to
20 berth where they please, even after permission has been denied, such tortious conduct would (as
21 here) directly interfere with the wharfinger's ability to conduct business and to provide
22 accommodations to both commercial and recreational vessels. Such trespass could also interfere
23 with navigation and commerce, due to an inability of commercial and other vessels to berth at
24 slips and wharfs occupied by trespassing vessels. In this case, the trespass actually and directly
25 interferes with PLAINTIFF's maritime business, because PLAINTIFF is being actively
26 prevented from using the space occupied by the DEFENDANT VESSEL. In view of the above

27 ///

28 ///

1 standard, and the personification of a vessel recognized in admiralty, it is hardly surprising that
2 (as detailed below), the tort of trespass is not a stranger in admiralty.

3 **D. PLAINTIFF Was Contractually Entitled to Receive Payment for**
4 **Wharfage Services It Provided, To Receive Proof of Insurance, To**
5 **Terminate the Wharfage Contract Upon 30 Days' Notice And**
6 **To Require The DEFENDANT VESSEL To Vacate The Marina.**

7 As pointed out above, the "Wharfage Contract" is, by its own terms, a month-to-month
8 contract, terminable by either party, as paragraph 2 specifically provides that "Owner
9 understands and agrees that this agreement memorializes a month-to-month contract to provide
10 mooring [and paragraph 5 provides that] Owner understands and agrees that this agreement
11 may be terminated by either party upon written notice to the other in such a manner so that the
12 other party will receive said notice at least thirty (30) days before said termination." Exh. A to
13 Weiss Decl. Naturally, it also requires that the DEFENDANT VESSEL and her owner to timely
14 tender monthly payments for wharfage and other maritime services; PLAINTIFF alleges in this
15 action the DEFENDANT VESSEL failed to perform this duty of payment.

16 Even if Mr. Hach did not sign the Wharfage Contract, an implied freely terminable
17 month-to-month wharfage contract would nevertheless have existed between PLAINTIFF on the
18 one hand and the DEFENDANT VESSEL and her owner on the other hand, as a well defined
19 controlling industry standard exists within the Port of San Diego among privately operated
20 marinas, pursuant to which marinas enter into freely terminable month-to-month wharfage
21 contracts, rather than long term wharfage contracts. Declaration of Philip E. Weiss at para. 3.

22 What is more, even if no controlling industry standard existed (and PLAINTIFF is unaware of
23 any evidence to suggest this), a freely terminable implied wharfage contract on month-to-month
24 terms nevertheless exists between PLAINTIFF on the one hand and the DEFENDANT VESSEL
25 and her owner on the other hand, since California Civil Code Section 1943 provides that "[a]
26 hiring of real property, other than lodgings and dwelling-houses, in places where there is no
27 custom or usage on the subject, is *presumed* to be a month-to-month tenancy unless otherwise
28 designated in writing" (*Id.*, emphasis added).

///

Paragraph 3 of the Wharfage contract requires that wharfage fees be paid "in advance on the first of each month." Few terms could be more material to any contract than the obligation to pay. At the time the Wharfage Contract terminated the DEFENDANT VESSEL's account stood in arrears in the amount of \$1,929.60, and she subsequently failed to pay transient wharfage fees accruing after the date the Wharfage Contract terminated, at the usual and customary rate of \$1.50 per foot of vessel length per day. Oliver Decl. at para. 6-7; Exh. A to Oliver Decl. (accounting detailing arrearages at time of Wharfage Contract termination, and transient wharfage fees accrued thereafter, until vessel arrest). The DEFENDANT VESSEL's failure to pay wharfage fees constitutes a breach of the contractual duty to pay for the services provided for her benefit.

In addition, as pointed out above, the DEFENDANT VESSEL (by and through her owner) refused to provide evidence of the insurance required by Paragraph 18 of the Wharfage Contract, although this Paragraph specifically requires that proof of the required insurance be provided "upon request" Oliver Decl. at para. 5. This failure constitutes an obvious and additional breach of the Wharfage Contract.

E. The DEFENDANT VESSEL Occupied Slip Space Without Contractual Or Other Authority, And Hence Engaged In the Maritime Tort of Trespass.

Admiralty courts have long recognized the legal fiction a vessel is a person, and hence that they are responsible for both their debts and torts. Consistent with this, the Ninth Circuit has observed: "The right to proceed *in rem* – based on the legal fiction of vessel as wrongdoer – certainly has a long and important history. Fireman's Fund Ins. Co. v. M/V DSR ATLANTIC, Etc., 131 F.2d 1336, 1338 (9th Cir. 1997); *see also* The CHINA, 74 U.S. (Wall.) 53, 68, 19 L.Ed. 67 (1868) (maritime lien arises against vessel based on tort of collision, recognizing legal concept dating to "middle ages" of responsibility of a vessel for her torts). Professor Thomas Schoenbaum, the author of perhaps the most widely recognized maritime law treatise has commented: "The theoretical basis of the maritime lien goes to the heart of all that is distinctive about admiralty law: it is a right based upon the legal fiction that the ship is the wrongdoer – the ship itself caused the loss and can be called to the bar to make good the loss." T. Schoenbaum,

1 Admiralty and Maritime Law (West Publishing 2004) at section 9-1.

2 The legal concept of trespass by a vessel is not a stranger to admiralty cases. *See, e.g.,*
 3 The CHANCELLOR, 30 F.2d 227, 228-229 (2nd Cir. 1929) (defendant vessel recognized as "a
 4 trespasser," where she "occupied a berth . . . without right or permission [of the wharfinger]");
 5 Diamond State Tel. Co. v. Atlantic Refining Co., 205 F.2d 402, 406 (3rd Cir. 1953) (cable in
 6 river not held to be "trespasser"); and New York Trap Rock Corp., Etc. v. Red Star Towing &
 7 Transp. Co., 172 F. Supp. 638, 644 (S.D.N.Y. 1959) (observing in case where vessel moored
 8 without permission and damaged owner's dock that in various cases the concept of trespass
 9 arising out of an unauthorized entry upon or use of property of another is recognized in
 10 admiralty); and In re Banks' Petition, 133 F. Supp. 276 (E.D.N.Y. 1955) (owner liable for dock
 11 damage by trespassing vessel). Not surprisingly, holding a vessel accountable for her torts is
 12 also a principle embodied statutorily. The Commercial Instruments and Federal Maritime Lien
 13 Act specifically recognizes damages arising from maritime torts as giving rise to a "preferred
 14 maritime lien. 46 U.S.C. section 31301(5)(B) (defining "preferred maritime lien" to include
 15 "damages arising out of maritime tort.")

16 It is well established that the "essence of the cause of action for trespass is an
 17 unauthorized entry onto the land of another. Such invasions are characterized as intentional torts,
 18 regardless of the actor's motivation." Miller v. National Broadcasting Co., 187 Cal. App. 3d
 19 1463, 1477, 232 Cal.Rptr. 668 (1986); *see also* Huntingdon Life Sciences, Inc. v. Stop
 20 Huntingdon Animal Cruelty, 129 Cal. App. 4th 1228, 1264; 29 Cal. Rptr. 3d 521 (2005),
 21 ("essence of the cause of action for trespass is an 'unauthorized entry'") Church of Christ in
 22 Hollywood v. Superior Court, 99 Cal. App. 4th 1244, 1252 (2002) (so holding).

23 The intent required "as a basis for liability as a trespasser is simply an intent to be at the
 24 place on the land where the trespass allegedly occurred." Miller at 1477. The defendant "is
 25 liable for an intentional entry although he has acted in good faith, under the mistaken belief,
 26 however reasonable, that he is committing no wrong." *Id.*

27 It is respectfully suggested that the DEFENDANT VESSEL, by occupying space at
 28 PLAINTIFF's marina following termination of the applicable wharfage contract, has committed

the maritime tort of trespass, which act, under both the General Maritime Law and the Commercial Instruments and Federal Maritime Lien Act, gives rise to a maritime lien and a right to recovery of damages that is enforceable *in rem* in admiralty. After the DEFENDANT VESSEL is (presumably) disposed of at interlocutory auction, any proceeds would become a substitute *res*, against which PLAINTIFF would become entitled to recovery to the same extent as its former entitlement against the offending vessel. *See, Ferrous Financial Servs. Co. v. O/S ARCTIC PRODUCER*, 567 F. Supp. 400 (W.D. Wash. 1983) (auction proceeds become substitute *res* for a Defendant Vessel).

F. Entitlement to and Quantification of Damages.

1. Damages Based on Consequences Flowing From Tort of Trespass

California Civil Code section 3333 provides the statutory measure for damages in tort actions:

"For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not"

In recognition of the seriousness of the tort of trespass and the adverse implications of this tort, many cases have applied this broad measure of damages in providing for recovery based not only the direct consequences of the trespass, but also on the indirect consequences, including even ones not reasonably foreseeable. *See, e.g., Miller v. National Broadcasting, supra* at 1477 (holding a trespasser is "liable for all direct consequences of any conduct engaged in while trespassing [and that] frequently the defendant is held liable for indirect consequences, some of which are not reasonably foreseeable, of conduct engaged in while trespassing." The *Miller* Court reasoned that it "is important to realize that those who use another's land without permission may justifiably have risks of losses allocated to them far beyond those normally imposed when liability is imposed on a negligence theory." *Id.* The fact that an abandoned vessel would be arrested, and that the aggrieved property owner would have to expend substantial resources to press such remedy, was entirely foreseeable, and (as pointed out above) even if it was not foreseeable, the associated costs of suit (including *custodia legis* expenses)

1 would still be recoverable. It was equally foreseeable (but again not required) that transient (or
 2 “guest”) fees would be charged for a vessel that occupies a slip without permission of any kind,
 3 particularly where, as here, the Wharfage Contract specifies that a “guest” fee will be charged.

4 Accordingly, PLAINTIFF respectfully urges that in view of the trespass occurring in this
 5 case, any judgment entered by this Honorable Court include “transient” fees accruing after the
 6 date of termination of the Wharfage Contract (until the vessel arrest date), plus all reasonable
 7 costs of suit, including *custodia legis expenses*. PLAINTIFF acknowledges that, as a general
 8 matter, attorneys’ services incurred in pursuing a maritime necessities lien (such as is asserted
 9 in this action) do not give rise to or enhance an existing maritime lien. Accordingly, while it
 10 seeks “costs” of suit, PLAINTIFF does not seek recovery in this action of attorneys’ fees, and
 11 hereby abandons any in rem claim for recovery of attorneys’ fees.

12 **2. Costs of Suit Recoverable Pursuant to Local Rule.**

13 "Unless otherwise ordered by the court, or stipulated by the parties, the prevailing party
 14 shall be entitled to costs." Local Civil Rule 54.1a. Services or property advanced to preserve
 15 and maintain an arrested vessel, furnished upon authority of the court, are unquestionably cost
 16 that are allowable as *custodia legis expenses*. See generally, New York Dock Co. v. The
 17 POZNAN, 274 U.S. 117, 71 L. Ed. 955, 47 S. Ct. 482 (1927); Turner & Blanchard, Inc. v. S.S.
 18 EMILIA, 322 F.2d 249 (2d Cir. 1963); Morgan Guar. Trust Co. v. Hellenic Lines Ltd., et al., 593
 19 F. Supp. 1004 (S.D.N.Y. 1984), and Barwil ASCA v. M/V SAVA, 44 F. Supp. 2d 484, 489
 20 (E.D.N.Y. 1999) (granting motion for reimbursement of *custodia legis expenses*).

21 **3. Recoverable Transient Wharfage Fees.**

22 As above explained, it is a well established industry practice for marinas to charge a
 23 “guest” or “transient” wharfage fee for vessels that either do not have an existing month-to-
 24 month wharfage contract in place and where the intention is for the vessel to occupy a slip for
 25 a short period, or where a vessel without permission to do so occupies space at a marina. Oliver
 26 Decl. at para. 7; Weiss Decl. at para. 8. When the DEFENDANT VESSEL refused to vacate the
 27 marina following termination of any contractual authority to remain, she deprived PLAINTIFF
 28 of the ability to lease the slip to another (paying) vessel. Surely it was the expectation of the

1 parties that the vessel would leave following termination of the Wharfage Contract, and that if
2 she remained without authority wharfage fees for such interloping vessel would be calculated
3 (at a minimum) at the customary "guest" or "transient" rate. The term requiring a vessel to leave
4 the marina after terminating a wharfage contract is one of necessary implication.

5 It is axiomatic that in every contract, whether written, oral or implied, there exists an
6 implied covenant of good faith and fair dealing that neither party will do anything which impairs
7 the right of the other to receive the benefits of the agreement. Brown v. Superior Court, 34
8 Cal.2d 559, 564, 212 P.2d 878 (1949). A key benefit of the contract, which was freely
9 terminable by both parties, was the ability to simply extricate an unsatisfied party from
10 contractual obligations. If a vessel owner is dissatisfied with PLAINTIFF's marina for any
11 reason, he or she cannot reasonably or in good faith deprived of his or her right to simply
12 terminate the contract and move the vessel elsewhere. Conversely, the DEFENDANT
13 VESSEL's continued presence at the marina following termination of any contractual right to
14 remain deprived PLAINTIFF of a significant benefit of its bargain – the right to require a vessel
15 to leave by simply providing 30 or more days advance notice.

16 As this Honorable Court sits in equity in this admiralty action, such an award is well
17 within its authority. Judge John Brown of the Fifth Circuit Court of Appeals described the role
18 of a Federal District Court Judge sitting in Admiralty in his own unique way: "The Chancellor
19 is no longer fixed to the woolsack. He may stride the quarter-deck of maritime jurisprudence and,
20 in the role of admiralty judge, dispense, as would his landlocked brother, *that which equity and*
21 *good conscience impels.*" Compania Anonima Venezolana De Navegacion v. A. J. Perez Export
22 Co., 303 F.2d 692, 699 (5th Cir. 1962) (emphasis added).

23 Obviously no one would expect that a trespassing vessel can avail itself of the preferential
24 wharfage rates that are provided to vessels under existing and binding written wharfage
25 contracts. PLAINTIFF respectfully urges that this Honorable Court award damages to include
26 transient wharfage fees for the period between the termination date of the Wharfage Contract and
27 the date the U.S. Marshal arrested the DEFENDANT VESSEL.

28 ///

1 **4. Monthly Wharfage Fee Arrearages**

2 On the date of the termination of the Wharfage Contract on September 7, 2006 the
3 account was in arrears in an amount of \$1,929.60. No part of this sum has been paid.

4 **5. Prejudgment Interest Is Recoverable at 5.0%**

5 In admiralty cases, "prejudgment interest 'should be granted in the absence of exceptional
6 circumstances.'" *See, e.g., Ingersoll Milling Mach. Co. v. M/V Bodena*, 829 F.2d 293, 310 (2d
7 Cir. 1987) (*quoting Mitsui & Co. v. American Export Lines*, 636 F.2d 807, 823 (2d Cir. 1981)),
8 *cert. denied*, 484 U.S. 1042, 108 S. Ct. 774, 98 L. Ed. 2d 860 (1988); *Independent Bulk Transp.*
9 *v. Vessel "Morania Abaco,"* 676 F.2d 23, 25 (2d Cir. 1982); *Reeled Tubing, Inc. v. M/V CHAD*
10 *G*, 794 F.2d 1026 (5th Cir. 1986) (interest is awarded in admiralty absent "peculiar
11 circumstances").

12 The Courts enjoy broad discretion in setting prejudgment interest rates. *See, e.g., In re*
13 *Nichole Trahan*, 10 F.3d 1190, (5th Cir. 1994); and *Gator Marine Service Towing, Inc. v. J. Ray*
14 *McDermott & Co.*, 651 F.2d 1096 (5th Cir. 1981). Generally, the federal courts sitting in
15 admiralty are not bound by state-prescribed legal interest rates. *Edinburgh Assurance Co. v. R.L.*
16 *Burns Corp.*, 669 F.2d 1259 (9th Cir. 1982) and can award interest at prevailing commercial rates.
17 *See, e.g. Cargill, Inc. v. Taylor Towing Service, Inc.*, 642 F.2d 239 (8th Cir. 1981). *In re*
18 *AMOCO CADIZ*, 1992 A.M.C. 913 (7th Cir. 1992) the Court held that the market rate for
19 purposes of calculating prejudgment interest is what the victim would pay to borrow money. The
20 *AMOCO CADIZ* Court determined that evidence of the average prime rate for the period in
21 question is a reasonable consideration. *Id.*; *see also United States v. Central Gulf Lines, Inc.*,
22 974 F.2d 621 (5th Cir. 1992) (holding District Court sitting in admiralty may look to the cost of
23 borrowing to determine the interest rate on a judgment). According to Wall Street Journal
24 historical data reported by Bankrate.com, the average prime rate, as of May 7, 2008, is 5.00
25 percent. Weiss Decl. at para. 9; Exh. C to Weiss Decl. (Bankrate.com schedule reflecting WSJ
26 prime rate of 5.0%). PLAINTIFF thus respectfully requests that Judgment enter and include
27 prejudgment interest, calculated at the rate of five percent (5%) per annum.

28 ///

1 **G. Total Damages Recoverable**

2 As detailed above, PLAINTIFF is entitled to judgment for the following damages:

3 1. **Wharfage Arrearages.** As explained above and appearing from the Declaration
4 of Brad Oliver, the account for the DEFENDANT VESSEL at the time of her arrest stood in
5 arrears in an amount of \$1,929.60. Oliver Decl. at para. 6-7.

6 2. **Guest Vessel Wharfage Fees.** As demonstrated above, as a matter of contract,
7 industry custom, and equity, PLAINTIFF is entitled to recover transient wharfage fees for the
8 period between the termination date of the Wharfage Contract and the date the U.S. Marshal
9 arrested the DEFENDANT VESSEL, at the rate of \$1.50 per foot of vessel length per day, or
10 \$60.00 per day for the DEFENDANT VESSEL (i.e., 40 feet X \$1.50 = \$60). Oliver Decl. at
11 paras. 6-7. Forty seven days elapsed between the time the Wharfage Contract terminated on
12 September 21, 2007 and (as reflected on the U.S. Marshal Form 285 on file herein) the date the
13 U.S. Marshal seized the DEFENDANT VESSEL on November 7, 2007. PLAINTIFF is hence
14 entitled to recover transient wharfage fees for the 47 days the offending vessel remained as a
15 trespasser at its marina at the rate of \$60.00 per day, which totals \$2,820.00.

16 3. **Custodia Legis Expenses – U.S. Marshal Fees and Substitute Custodian Fees.**

17 The United States Marshal will deduct some portion of the \$3,000.00 deposit tendered
18 by PLAINTIFF to the U.S. Marshal, for its use in connection with its services of process, notice
19 of arrest and sale, port risk insurance, commission and preparation of a bill of sale. Weiss Decl.
20 at para. 10. U.S. Marshal expenses will continue to accrue until such time as it is relieved of
21 duties by the Court, presumably following the Court-Ordered sale of the DEFENDANT
22 VESSEL and confirmation of the sale pursuant to the Local Admiralty Rules.

23 PLAINTIFF was appointed as the Substitute Custodian in this case. It invoiced for its
24 services at the rate of \$50.00 per week for detailed interior vessel inspections, plus general
25 custodial fees at the rate of 50 cents per foot of vessel length per day (i.e., 40 feet X .50 = \$20.00
26 per day), plus a wharfage component of \$12.50 per foot per month (or \$500.00 (i.e., \$12.50 X
27 40 = \$500). Custody of the DEFENDANT VESSEL was transferred to the Substitute Custodian
28 by the U.S. Marshal on the date of the vessel arrest, November 7, 2008 and it is expected she will

1 remain its custody until she is sold at public auction pursuant to Order of this Honorable Court.
 2 PLAINTIFF cannot accurately quantify the Substitute Custodian fees until such time as the
 3 Substitute Custodian is released from its duties by the Court, presumably following the Court-
 4 Ordered sale of the DEFENDANT VESSEL.

5 4. **Filing Fee.** The filing fee PLAINTIFF paid in the amount of \$250.00 to institute
 6 the instant action is recoverable as a cost of suit, both pursuant to Local Civil Rule 54.1 as well
 7 as pursuant to terms of the Wharfage Contract.

8 5. **Attorneys' Fees.** For the reasons indicated above, PLAINTIFF has abandoned
 9 its claim for attorneys' fees in this purely *in rem* action.

10 III

11 CONCLUSION

12 To continue this action further will result in a further squandering of judicial resources.
 13 PLAINTIFF respectfully urges this Honorable Court to enter Judgement in this action, reflecting
 14 the damages specified above. However, because *custodia legis* expenses are still accruing, and
 15 therefore PLAINTIFF's damages cannot yet be fully quantified, PLAINTIFF respectfully seeks
 16 leave to submit a [Proposed] Final Order Entering Judgment By Court (consistent with the
 17 [Proposed] Interim Order Granting Judgment By Court, submitted concurrently herewith)
 18 promptly after the sale of the DEFENDANT VESSEL, should the Court grant the concurrently
 19 filed Motion for Interlocutory Vessel Sale.

20 For all of the above reasons and in the interest of fundamental justice, PLAINTIFF
 21 respectfully requests that Judgment enter in favor of PLAINTIFF and against the DEFENDANT
 22 VESSEL, as above requested.

23 Dated: May 21, 2008

Respectfully submitted,

24 WEISS & JONES

25 By: s/Philip E. Weiss
 26 Attorneys for Plaintiff
 27 Bartell Hotels, dba Half Moon Anchorage
 28 E-mail: shiplaw@earthlink.net